

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MANUEL DE JESUS ROSARIO,

Plaintiff,

-against-

MIS HIJOS DELI CORP., PALMA GROCERY CORP.,
251 E 123RD ST. REALTY, LLC, JOSE PALMA,
LEONIDA COLLADO, and JUNIOR PALMA,

Defendants.

No. 15-CV-6049 (LTS)(DCF)

DEFENDANT'S LOCAL RULE

**56.1 STATEMENT OF
MATERIAL FACTS**

Defendant, Jose Palma Sr. ("Jose Palma"), by his attorneys, Rodriguez Law, P.C. and the Law Offices of Martin E. Restituyo, P.C., in support of his Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, submits the following Statement of Material Facts pursuant to Rule 56.1 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York:

1. Jose Palma is the sole owner of 251 E. 123rd St Realty LLC ("Realty" or "the building")(Ex. 1)¹, the titular owner of Mis Hijos Deli Corp ("Mis Hijos")(Junior Dep. 7:7-13, 10:1-5, 17:4-6)(Palma Dep. 44:1-3, 31:8-12), but never the owner of Palma Grocery Corp (Collado Dep.95: 22-24, 131:12-15, 133:10-134:12)(Palma Dep. 9:20-23).

2. Mr. Palma has been implicated in this lawsuit by plaintiff, Manuel de Jesus Rosario, who claims that "at all times herein pertinent, Defendant[] Jose [Palma]... controlled the terms and conditions of employment, supervised employees, made decisions as to hiring and firing and as to wages with respect to the employees of [Mis Hijos Deli Corp.] in general, and with respect to Plaintiff in particular." Dkt. # 5, Comp. ¶ 38.

3. Notwithstanding the allegations in his complaint, however, during his Deposition testimony, Plaintiff told a different story.

¹ References to "Ex. ___" refer to the exhibits attached to the Declaration of Declaration of Argilio Rodriguez in Support of Defendant's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56

With respect to Realty:

4. When asked directly whether Jose Palma had ever hired him to work at the building, Plaintiff unequivocally stated “no.” (Ex. 2, Rosario Dep. 69:23-70:1)². He further noted that nobody hired him to work at the building (Rosario Dep. 69:4-7), and that working at the building was not part of his job. (Rosario Dep. 63:7-8, 66:20-22, 68:16-69:3).

5. When asked who sent him to work in the building, Plaintiff named Reuben, Leonida Collado and Junior Palma, but not once mentioned Jose Palma. (Rosario Dep. 61:11-17, 63:2-4, 64:12-21).

6. Moreover, when asked whether Jose Palma ever supervised the work that he did for the building, Plaintiff noted that “There’s nothing to supervise. Everything I do is well done.” (Rosario Dep. 69:23 – 70:5)

7. Indeed, according to Plaintiff, the only reason why Jose Palma even “knew that [Plaintiff] cleaned the building” was because “he saw me doing the work.” (Rosario Dep. 70:7-10).

8. In sum, even if it could be shown that Jose Palma was aware that Plaintiff cleaned the building, Plaintiff acknowledges that working at the building was not part of his job (Rosario Dep. 63:7-8, 66:20-22, 68:16-69:3), that he never got compensated for it (Rosario Dep. 63:9-11), and that he was never told that he would be compensated for it (Rosario Dep. 69:8-10).

With Respect to Mis Hijos

9. Mis Hijos is a domestic corporation that was created on May 21, 2013, in order to operate a grocery store at 2401 2nd Avenue, New York, New York 10035. Ex. 3[DOS Filing]. Jose

² Deposition transcripts are being referenced as follows: Deposition of Jose Joaquin Palma is being cited as “Palma Dep____”, Deposition of Leonida Collado is being cited as “Collado Dep ____”, Deposition of Jose Palma Jr s/h/a Junior Palma is being cited as “Junior Dep____”, and Deposition of Manuel de Jesus Rosario is being cited as “Rosario Dep____”.

Palma Jr. (“Junior”) began operating the Mis Hijos Deli Corp. grocery store in June 2013. (Ex. 4, Junior 9:10-18). After he opened the new store Plaintiff began working with him. (Rosario Dep. 70:11-16).

10. Jose Palma’s only connection with Mis Hijos Deli Corp was that after Defendant Palma Grocery went out of business, his children asked him for help in opening a new grocery store and he agreed. Jose Palma registered the business and applied for beer license, and then immediately returned home to the Dominican Republic. (Ex. 10, Palma Dep. 30:16-31:19).

11. The truth, however, is that Jose Palma played no role in Mis Hijos (Junior Dep. 7:7-13, 10:1-5, 17:4-6)(Palma Dep. 44:1-3, 31:8-12).

12. This fact was corroborated by Plaintiff who when asked about the last time that he saw Jose Palma stated “it’s about more than two years.” (Rosario Dep. 87:19-20). Then, when asked if he recalled the last time he saw Jose Palma before that, he noted that prior to that he had last seen Jose Palma when he became a citizen (Rosario Dep. 88:18-22).

13. Jose Palma became a citizen of the U.S. in 2012, he got his U.S. Passport on September 17, 2012, and left the country on September 20, 2012. (Ex. 6, Palma’s passport). In sum, Plaintiff testified that he has seen Jose Palma a total of two times in the past 4 years, a fact corroborated by Jose Palma’s passport which shows that from September 20, 2012 through September 13, 2016 he was only in the United States for a total of 25 days. *Id.*

14. Indeed, even if Jose Palma’s testimony saying that he had nothing to do with Mis Hijos (Palma Dep. 44:1-3), and Junior Palma’s testimony saying that he was the true and sole owner of Mis Hijos (Junior Dep. 7:7-13) were discounted, Plaintiff fails to establish that a man who he saw only two times in the past four years, and who spent less than 4 weeks in the United States of America over the past four years: (1) had the power to hire and fire him (2) supervised

and controlled his work schedule or conditions of employment, (3) determined his rate of pay and method of payment, and (4) maintained his employment records.

With Respect to Palma Grocery

15. Palma Grocery Corp. is a domestic corporation formed under the laws of the State of New York in 1978. [Ex.7, DOS Filing]. Palma Grocery is and always was the property of Leonida Collado. (Ex. 8, Collado Dep. 15:20-23)(Palma Dep. 9:20-23). All of the Grocery store's licenses were under her name (Ex. 10, Corporate Report for Grocery Store Beer License from NY State Liquor Authority) and she was there every day (Rosario Dep. 38:13-15), She directed Plaintiff's work (Rosario Dep. 38:11-12) and she regularly paid him (Rosario Dep. 38:9-10)

16. Plaintiff's claim that Jose Palma had anything to do with his employment there is similarly defeated by his testimony indicating that Reuben hired him, set his schedule, his pay rate, and his method of payment. (Rosario Dep. 35:20-36:18).

17. At best the only claimed involvement of Jose Palma at Palma Grocery was that "sometimes" he would pay when the manager was not around (Rosario Dep. 37:24-38:3). Conveniently, Reuben, the manager, like Leonida Collado, who would also pay him, was there daily (Rosario Dep.38:13-15)

Dated: New York, New York
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/s/ Argilio Rodriguez
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